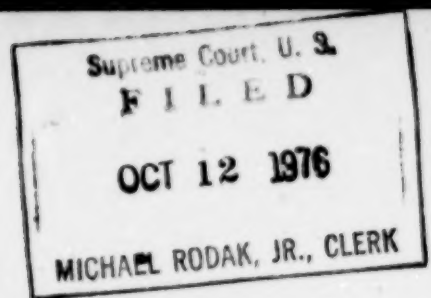


76-5061



**In the Supreme Court of the
United States**

October Term, 1976

No.

A, B, C, D, E, F, G, and H,

Petitioners

vs.

THE DISTRICT COURT OF THE SECOND
JUDICIAL DISTRICT and THE HONORABLE
LEONARD PLANK, Judge Thereof,

Respondents

**PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF COLORADO**

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Petition

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No.

A, B, C, D, E, F, G, and H,

Petitioners

vs.

THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT and THE HONORABLE LEONARD PLANK, Judge Thereof,

Respondents

PETITION

Petitioners respectfully request that a writ of certiorari issue to review the judgment of the Supreme Court of Colorado.

*Opinions Below
Jurisdiction*

OPINIONS BELOW

The opinion of the Supreme Court of Colorado is reported at Colo. , 550 P.2d 315, and is printed as Appendix A. The petition to the Colorado Supreme Court for rehearing is printed as Appendix B. The denial of the petition for rehearing by the Colorado Supreme Court is printed as Appendix C.

JURISDICTION

The judgment of the Supreme Court of Colorado was entered on May 24, 1976. The Court denied a petition for rehearing on June 14, 1976. On August 24, 1976, Petitioners received an order from the United States Supreme Court extending their time in which to file a Petition for Writ of Certiorari to and including October 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Questions Presented

QUESTIONS PRESENTED

I.

Whether work product prepared by counsel in a civil action which is sought by a Grand Jury is not protected by the work product exemption unless the subject matter of the civil case and the Grand Jury are closely related.

II.

Can a court demand that documents protected by the attorney-client privilege be produced for inspection to determine evidence of criminal activity to lift that privilege without first making a prima facie showing of criminal activity independent of the documents?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions which the above-entitled Petition involves are as follows:

Constitution of the United States, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States, Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an

impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Constitution of the United States, Amendment XIV:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, of property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Colorado Supreme Court granted Petitioners leave to proceed by letter designations, rather than full names, to preserve the secrecy of the Grand Jury proceeding under way. Petitioners C, F, and H are insurance companies. Petitioners A and B are employees of Petitioner C. Petitioners D and E are employees of Petitioner F., and Petitioner G is an employee of Petitioner H. Attorney Q is a member of a Denver law firm which has represented insurance companies C and F for a period in excess of 20 years.

In November and December of 1975, Petitioners were served with subpoenas to appear, testify and produce certain documents before the Denver County Grand Jury. The Denver County Grand Jury was, and the Denver District Attorney is at the present time, involved in an investigation of the alleged theft of medical records. The Petitioners were identified as suspects in the investigation, along with a detective bureau known as Factual Services, its employees, and employees of certain doctors and hospitals throughout the Denver Metropolitan area.

Petitioners moved to quash the subpoenas and argued that they violated Petitioners' constitutional rights.

The Presiding Judge of the Grand Jury denied the motion and required that Petitioners produce the documents for an exclusive *in camera* inspection by the Court, to determine whether or not certain of the documents

were protected by the attorney-client privilege or the attorney work-product privilege. The Presiding Judge subsequently ruled that many of the documents were irrelevant to the investigation under way by the Denver County Grand Jury and excluded them from consideration by the jury. The District Court also ruled that an additional number of subpoenaed documents did not have to be produced because they were protected by the attorney-client privilege or the work-product exemption.

The Presiding Judge finally ruled that 25 documents should be produced, as they were relevant to the Grand Jury investigation and were not protected by the attorney-client privilege or the work-product exemption. In making his order, the Judge stated that although the documents normally would be subject to the attorney-client privilege and the work-product exemption, such privileges were dissolved because the exhibits contained evidence of possible criminal conduct by Petitioners and Attorney Q.

On December 10, 1975, Petitioners received a stay from the District Court and filed an original proceeding in the nature of a writ of prohibition with the Colorado Supreme Court asking that the District Court be prohibited from enforcing its order as set out above. The Colorado Supreme Court subsequently issued a rule to the District Court ordering it to show cause as to why such relief should not be granted. The matter was briefed and submitted to the Supreme Court for decision.

On May 24, 1976, the Colorado Supreme Court issued an order discharging its rule to show cause and upholding the District Court in its decision. The Court held

Statement of the Case

that work-product prepared for civil litigation was not subject to the work-product exemption in a subsequent Grand Jury proceeding unless there was a close relationship between the civil litigation and the Grand Jury proceeding. The Court also held that the *prima facie* showing required of the District Attorney to destroy an attorney-client privilege was constitutionally adequate by virtue of the fact that other indictments had been returned in the Grand Jury investigation and an exclusive *in camera* inspection of the privileged documents had been made by the District Court.

On May 27, 1976, counsel for Petitioners filed with the Colorado Supreme Court a motion for stay of execution. The Colorado Supreme Court granted a stay until June 8, 1976, and stated "no further Stays will be issued." Petitioners' motion for rehearing was denied by the Colorado Supreme Court on June 14, 1976.

During the time that the Colorado Supreme Court was considering the original proceeding filed by Petitioners, one of the insurance companies and its branch manager, Petitioners A and C in this matter, were indicted by the Denver County Grand Jury and charged with counts of criminal solicitation, theft receiving, and conspiracy. Each of these crimes are felonies. Pre-trial motions have been filed in the indictment against the Petitioners A and C. Trial of the indictment has been set for November 15, 1976.

Subsequent to the ruling of the Colorado Supreme Court on May 24, 1976, the Denver County Grand Jury and the District Attorney resumed their investigation involving the alleged theft of medical records. The other

Statement of the Case

Petitioners in this matter, B, D, E, F, G, and H were under an informal stay on the Grand Jury subpoenas which expired on June 21, 1976. This informal stay was pursuant to an agreement made with the District Attorney for the City and County of Denver and was based on the promise that Petitioners would ask the United States Supreme Court for a stay in this action no later than Friday, June 18, 1976. The United States Supreme Court, Justice White, rejected Petitioners' application, and the informal stay expired on June 21, 1976. On August 24, 1976, Petitioners received an order from the United States Supreme Court extending their time in which to file a petition for writ of certiorari to, and including, October 12, 1976.

WHEN AND HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The issue of the Petitioners having been denied their constitutional rights as a result of the District Court Judge ordering work product and attorney-client documents to be produced and entered into evidence was first raised in a motion to quash before the Grand Jury, and later raised in the petition for writ of prohibition in the Colorado Supreme Court.

REASONS FOR GRANTING THE WRIT

The decision of the Colorado Supreme Court is a significant detriment to the genius of our judicial system. The decision deals with the work product of an attorney, and when and where that privilege may be asserted, as well as the conditions through which an attorney-client privilege may be destroyed. To allow this decision to stand will undoubtedly create a tremendous amount of chaos in the legal profession, and will most certainly destroy the unique relationship that must exist between an attorney and his client, and an attorney's absolute right to privacy in his personal papers. The importance of granting the writ of certiorari extends far beyond this particular case. This Court now has the opportunity to set the guidelines under which these two privileges will exist.

I.

The Important Question of Whether Work Product Prepared by Counsel in a Civil Action Which Is Sought by a Grand Jury Is Not Protected by the Work Product Exemption Unless the Subject Matter of the Civil Case and the Grand Jury are Closely Related Is Squarely Presented Here and Should Be Decided by This Court

The decision of the Colorado Supreme Court that work product prepared for Civil litigation is not subject to the work product exemption in a Grand Jury proceeding

unless there is a close relation between the civil litigation and the Grand Jury proceeding violated the attorney's right to privacy protected by the Fourth, Fifth, Sixth, and Fourteenth Amendments, and petitioners' right to be free from unreasonable searches under the Fourth Amendment, and the right of petitioners to effective assistance of counsel guaranteed by the Sixth Amendment. This decision is in direct conflict with the Court of Appeals for the Fourth Circuit, as well as the substance and intent of United States Supreme Court decisions.

The conflict with the Fourth Circuit can be seen in *Duplan Corporation v. Moulinage et Retourdie de Chavanoz*, 487 F.2d 480 (1973), wherein the Court spoke to the work product exemption as applied to subsequent unrelated proceedings.

The Colorado Supreme Court in its order states:

"We hold that work product prepared by counsel in anticipation of specific litigation which is sought by a Grand Jury is not protected by the work product exemption *unless the subject matter of the civil case and the Grand Jury are closely related.*" (Emphasis added.)

The *Duplan* decision held that upon termination of litigation the work product of attorneys prepared incident thereto does not lose its privilege and hence *does not become discoverable in subsequent and unrelated litigation*. In reference to a request for documents in a subsequent unrelated action, *Duplan* stated in footnote 14:

"Then the question arises whether, assuming them to be within this privilege, the privilege is any

the less applicable because in the present case the inquiries with regard to the documents are being made in an action other than that in regard to which they were originally brought into existence. I do not think, if they were privileged in relation to the first action, that the privilege ceases in relation to another action."

The *Duplan* case grounded its decision on *Hickman Taylor*, 329 U.S. 495 at 483:

"*Hickman* clearly stands for the principle that the integrity of the adversary process must be safeguarded in spite of the desirability of the free interchange of information before trial. Its overriding concern is that the lawyer's morale be protected as he performs his professional functions in planning litigation and preparing his case. This work product immunity is the embodiment of a policy that a lawyer doing a lawyer's work in preparation of a case for trial should not be hampered by the knowledge that he might be called upon *at any time to hand over the result of his work to an opponent.*" (Emphasis added.)

In interpreting *Hickman v. Taylor* (supra), the Court stated in *Duplan* that:

"Rather, the thrust of the decision was the qualified protection of the professional effort, confidentiality and activity of an attorney which transcends the rights of the litigants. . . . we find no indication that the Court intended to confine the protection of the work product to the litigation in which it was prepared or to make it freely discoverable in a

Reasons for Granting Writ

subsequent lawsuit. To so interpret *Hickman* would in our opinion elide the broad rationale of the Court's decision." *Id.* at 483.

The Colorado Supreme Court recognized that the work product exemption should apply in Grand Jury proceedings but only "where the work product was gathered for the purpose of preparing to defend the client against an anticipated or pending criminal charge, which charge was also the subject of the Grand Jury proceeding."

Although the *Duplan* case does not concern a Grand Jury proceeding, the rationale of that case is equally applicable to a Grand Jury proceeding and, therefore, in opposition to the Colorado Supreme Court holding.

There is no decision by the United States Supreme Court supporting the Colorado Supreme Court decision. The two major cases dealing with work product, *U.S. v. Nobles*, 422 U.S. 225 (1975), and *Hickman v. Taylor*, 329 U.S. 495, indicate a direct conflict with this decision.

The impact of the *Hickman* and *Nobles* cases is that unless there has been a waiver of the attorney work product privilege (or the attorney client privilege), or the destruction of those privileges through some other procedures, they are not discoverable, nor can they be subpoenaed and used either in a Grand Jury proceeding or at a civil or criminal trial. No such waiver or procedure exists here. Quite the contrary, we have the mandatory production of this privileged material through a subpoena.

Hickman v. Taylor (supra) also emphasized the need for preparation and recognized the role of work product in that preparation:

Reasons for Granting Writ

"In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper presentation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case as the 'work product of the lawyer.'" *Id.* at 510, 511, 91 L.Ed. 451, 67 S.Ct. 385.

Hickman goes on to describe the consequences if work product were available on demand:

"Much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." *Id.*, at 510-511, 91 L.Ed. 451, 67 S.Ct. 385.

Reasons for Granting Writ

Under the *Hickman* rationale, as well as the other cases cited, it is difficult to see how counsel could render constitutionally mandated effective assistance if work product were readily discoverable. Although in *Hickman* the Court was addressing itself to material obtained by an attorney incident to the litigation then in progress, the rationale is scarcely less applicable to a case which has been closed than to one which is still being contested.

The Supreme Court has repeatedly recognized that the fundamental right to counsel is the right to the effective assistance of counsel. See *McMann v. Richardson*, 397 U.S. 759, 771, n.14, 24 L.Ed. 2d 763. Preparation for trial often may be a more important element in the effective assistance of counsel to which a defendant is entitled than the forensic skill exhibited in the courtroom. *Moore v. United States*, 432 F.2d 730, 435 (C.A.3 1970).

The primary policy underlying the work product doctrine is the protection of privacy of an attorney's mental processes. *Goldberg v. United States*, 96 S.Ct. 1338 (1976). This policy exists because "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Hickman v. Taylor* (supra).

In *In re Terkel*, 256 F. Supp. 683 (SDNY 1966), the Court indicates at page 685 that the attorney's right to privacy in his work is of constitutional dimensions:

"The ultimate interest to be protected is the privacy and confidentiality of the lawyer's work in preparing the case. It is the violation of that interest that is held offensive to the Constitution . . ."

Reasons for Granting Writ

The Grand Jury is without power to invade a legitimate privacy interest protected by the Fourth Amendment. *United States v. Calandra*, 414 U.S. 338, 38 L.Ed. 2d 561, 94 S.Ct. 613 (1974). The Grand Jury is therefore without power to invade the legitimate privacy interest of an attorney, at least without good cause. In this case, the Colorado Supreme Court compelled production before the Grand Jury of work product of an attorney without requiring any sort of showing of good cause, simply because the work product was prepared in anticipation of a civil case which the Court found was not closely related to the Grand Jury proceeding.

The ruling of the Colorado Supreme Court enables the Grand Jury to indict petitioners on evidence which violates their constitutional rights. But, more importantly, the ruling by the Colorado Supreme Court undermines the purpose of the work product exemption: the preservation of the integrity of the adversary system. Without some guarantee that work product will not be readily discoverable in a subsequent unrelated proceeding, attorneys will hesitate to prepare adequately and the quality of justice will suffer. The grave consequences envisioned in *Hickman v. Taylor* (supra) are no less applicable here.

By ruling as it did, the Colorado Supreme Court allowed work product prepared on the clients' behalf to be introduced as evidence against these same clients in a subsequent proceeding. Such a prospect in the mind of an attorney necessarily would restrict preparations made by him since he is concerned with not only the present but also the future welfare of his client.

II.

The Court Below Erred in Finding as a Matter of Law That an Independent Prima Facie Case of Criminality Had Been Established To Lift the Attorney Client Privilege

The attorney-client privilege exists to insure the right of every person to freely and fully confer in one having knowledge of law and skilled in its practice, in order that the client may have adequate and proper defense. *Baird v. Koerner*, 279 F.2d 623 (1960). If attorney-client communications were required to be made the subject of examination, such enactment would be a practical prohibition upon professional advice and assistance. *United States v. Louisville & Nashville Railroad Company*, 236 U.S. 318 (1914).

An exception to the attorney-client privilege arises when the communication between the attorney and client effectuates the furtherance of a crime. However, before the privilege can be lifted, procedural due process and right to counsel require the government to make a prima facie showing that the communication was in furtherance of a crime. In *Securities and Exchange Commission v. Harrison, et al.*, 80 F. Supp. 226, the Court stated:

"It has long been recognized in both English and American courts that the party attacking the privilege on the ground that communications were to further a fraudulent purpose must produce sufficient evidence to sustain a finding that the communications were for such wrongful purpose before evidence as to the communications will be required."

In 1972 this same position was supported by the United States Court of Appeals, Ninth Circuit, certiorari denied, in *United States of America v. Leonard R. Shewfelt and Imperial County Land Company*, 455 F.2d 836, cert. denied 406 U.S. 296, wherein the Court said:

"Nevertheless, before the privileged status of these communications can be lifted, the government must first establish a *prima facie* case of fraud independent of said communications."

The Colorado Supreme Court agrees that there must be a *prima facie* showing but states that evidence merely giving "colour to the charge" is sufficient. The quantum of proof required by the Court is in contradiction to *Shewfelt*, which held that an independent "*prima facie* case" of fraud must be established.

Using its unprecedented low standard of proof, the Colorado Supreme Court found sufficient evidence to lift the attorney-client privilege on correspondence between petitioners and their counsel based on the following:

"The indictments, combined with the information in the other documents ordered produced, are sufficient evidence to make out a *prima facie* case of the applicability of the criminal purpose exception to each of the documents in which Factual Service Bureau was alluded to."

Each piece of evidence relied upon by the Court is deficient. Most significantly, the Court made use of an *in camera* inspection of the documents themselves to ascertain that Factual Service Bureau was mentioned. This is analogous to the type of reasoning encountered by this

Reasons for Granting Writ

Court in such cases as *United States v. Di Re*, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. in 210 (1947), where this Court rejected the notion that the items seized in a search could be used to establish the requisite probable cause necessary to instigate a legal search and seizure. In this Colorado Supreme Court decision, the procedure previously denounced in *United States v. Di Re*, supra, was adopted by the Colorado Supreme Court in that privileged documents themselves were required to be produced. The documents were then examined and subsequent to that, the Court stated that there was a *prima facie* case or probable cause to require their being produced, in that the criminal purpose exception to the attorney-work product privilege had been shown to the satisfaction of the Court. This is totally contrary to the established law of this Court.

The Colorado Supreme Court also relied upon the indictments of "four individuals in this particular investigation", and other subpoenaed documents, but there was absolutely no showing that either was relevant to the character or compulsory production of the documents in issue.

Even if the indictments were relevant, this does not remove the requirement of a "prima facie case" *independent* of the subpoenaed documents. At the outset of the Grand Jury investigation, many documents were taken from Factual Services Bureau via a search warrant. There is no showing in the record that the indictments were not based in part on any of these seized documents, which are identical to the subpoenaed (privileged) documents. Without such a showing, there is no proof that the documents themselves were not used to support the indictment; there-

Reasons for Granting Writ

fore, there has been no *independent* source of information. The rationale used by the Colorado Supreme Court ignores the holdings which require an independent source of information to destroy the attorney-client privilege and denies petitioners procedural due process.

 CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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50 South Steele Street,
Suite 450,
Denver, CO 80209,
Attorneys for Petitioners

Appendix A

APPENDIX

 No. 27044

 May 24, 1976

A, B, C, D, E, F, G, and H,

Petitioners

v.

 The District Court of the Second Judicial District and The
 Honorable Leonard Plank, Judge thereof,

Respondents

v.

Attorney Q,

Intervenor

 ORIGINAL PROCEEDING

En Banc

 RULE MADE ABSOLUTE IN PART
 AND DISCHARGED IN PART

Holm, Willis & Dill,

Jon L. Holm, Attorneys for Petitioners

Dale Tooley, District Attorney

Appendix A

Brooke Wunnicke, Chief Appellate Deputy District Attorney

Thomas P. Casey, Chief Deputy District Attorney,
Attorneys for Respondents

Yegge, Hall & Evans

Paul D. Cooper, Attorneys for Intervenor

 MR. JUSTICE KELLEY delivered the opinion of the Court:

Petitioners instituted this original proceeding under C.A.R. 21 seeking relief in the nature of prohibition from the order of the Presiding Judge of the 1975 Statutory Grand Jury, the Honorable Leonard Plank, respondent, which denied their motions (a) to quash grand jury subpoenas and (b) to vacate the order requiring petitioners to appear and testify before the grand jury. Petitioners challenged the subpoenas on four grounds: (1) that the subpoenas constituted unreasonable searches and seizures; (2) that they violated the privilege against self-incrimination; (3) that they violated the attorney-client privilege; and (4) that the subpoenaed material was exempt as the work-product of an attorney.

We issued a rule to show cause why the relief sought should not be granted. In order to preserve the secrecy of the grand jury proceedings under Crim. P. 6.2 (1975 Supp.), we also granted petitioners' motion to permit petitioners to use certain anonymous letter designations in place of their names and to submit the exhibits in question

Appendix A

in sealed envelopes.¹ The respondent answered the show cause order, and briefs were filed by all parties, including an intervenor, Attorney Q. The matter is now at issue. The rule is made absolute in part and discharged in part.

The statutory grand jury had been empaneled for some time and was investigating criminal acts alleged to have been committed by Factual Service Bureau, Inc., a private investigation firm, and its activities and relationship to certain insurance companies and attorneys. More specifically, the grand jury was investigating the possible existence of conspiracies to obtain confidential medical information by criminal means for use by the insurance companies and their attorneys in assessing and defending personal injury claims. No challenge is raised by petitioners as to the right or authority of the grand jury to inquire into the area of its present concern.

Petitioners C, F and H are insurance companies. Petitioners A and B are employees of petitioner C. Petitioners D and E are employees of petitioner F, and petitioner G is an employee of petitioner H. Attorney Q is a member of a Denver law firm which has represented insurance companies C and F for a period in excess of twenty years.²

In November, 1975, when petitioners and Attorney Q were either residents of or doing business in Colorado,

¹ In this opinion, references to petitioners and the exhibits will be by letter and number, respectively, which will correspond to the designations contained in the motion for protective orders and the sealed exhibits.

² The lawyer for insurance company petitioner G has not been subpoenaed and is not a party in this proceeding.

Appendix A

they were served with grand jury subpoenas.³ The subpoenas required that each of the petitioners⁴ appear before the grand jury to testify and to produce the following documents:

"All of the following for the period of November 1, 1972, to date, in which the Colorado offices or agents of [named insurance company petitioner] are or have been in any way involved:

"1. Original and copies of all correspondence communications (including notations, memoranda summaries or recordings thereof) between [named insurance company petitioner] its agents and employees and Factual Service Bureau, Inc., (hereinafter 'Factual') and its agents and employees.

"2. All cancelled checks of [named insurance company petitioner] payable to Factual.

"3. All billings and invoices of Factual to [named insurance company petitioner].

"4. Originals and copies of all medical information and records (including summaries thereof) transmitted to [named insurance company petitioner] by Factual.

"5. All orders to Factual for medical information or investigation.

³ Employee petitioners A and B, D and E, and G were served individually and in their capacities as agents or managers of insurance company petitioners C, F and H respectively. Thus, the insurance company petitioners were served through petitioners A, B, D, E, and G.

⁴ The subpoena for Attorney Q is not made a part of the record in this original proceeding.

Appendix A

"6. Complete file on Claim No. [number inserted], concerning the claim of [claimant's name inserted].⁵

"7. All microfilm copies of the above, if the originals or copies are not available in documentary form."

On or prior to the date set for their initial grand jury appearances, petitioners filed a motion to quash the subpoenas. A hearing on the motion followed on November 21, 1975. Lawyer Q was permitted to intervene because of his interest in the matter. At the outset of the hearing, the district attorney advised counsel for petitioners and Attorney Q that some of the petitioners were subjects of the grand jury investigation and would be advised of their Fifth Amendment rights when they appeared before the grand jury.

At the beginning of the hearing, the respondent judge advised counsel for petitioners that inasmuch as the subpoenaed documents were corporate records they were not protected by the Fifth Amendment, and he so ruled. Respondent also observed that some of the subpoenaed documents might be subject to the attorney-client privilege and the work-product exemption, but that to make such a determination an *in camera* exclusive inspection by the judge would be required.

⁵ Some of the subpoenas required files from a petitioner on more than one claim. The claims involved cases not yet referred to counsel, workmen's compensation cases, cases in suit pending trial, cases after trial pending appeal, cases tried once and awaiting retrial, and cases which had been settled.

Appendix A

The respondent thereupon ordered petitioners to produce all subpoenaed documents for his *in camera* inspection and determination of whether the claimed privilege and exemption applied to any of the documents.

The documents were produced on November 25, 1975, and on December 10, 1975, respondent ruled that a number of subpoenaed documents did not have to be produced because they were either unrelated to the grand jury investigation or were protected by the attorney-client privilege or the work-product exemption. There is no issue raised as to these documents.

The respondent also ordered that the twenty-five exhibits involved in this proceeding be produced because they were relevant to the grand jury investigation and were not protected by the attorney-client privilege. He held that although the documents normally "would be subject to the attorney-client privilege protecting confidential communications and work-product, the privilege was dissolved" because the exhibits contained evidence of possible criminal conduct by petitioners and Attorney Q. The possible criminal conduct was an alleged conspiracy to acquire medical records by illegal means through Factual Service Bureau.

We conclude that respondent's written order of production was correct, except as to two specific documents in which the attorney-client privilege was erroneously found to be dissolved.⁶ Therefore, we discharge the rule in its entirety, except as to these two minor exceptions.

⁶ The two documents are specified in section III E of this opinion.

Appendix A

I.

It is, of course, the rule that a grand jury is entitled to obtain by testimony or subpoena all evidence necessary for its deliberations. However, in certain circumstances, exceptions to the general rule are permitted. For example, there is the necessity for conformity with the reasonableness requirement of the Fourth Amendment to the federal constitution. There is also the Fifth Amendment privilege from being compelled to be a witness against oneself, excusing a witness from testifying in a manner that will tend to incriminate him. Public policy also shields certain confidential matters, and in other situations for special reasons a witness may be excused from telling all that he knows. *Losavio v. District Court in & for Tenth Jud. Dist.*, Colo. , 533 P.2d 32 (1975), and cases cited therein.

The petitioners and the intervenor claim that their situation brings them within exceptional situations and that, therefore, they should not be compelled to produce documents nor be required to testify. Our examination of the facts in the light of the applicable law leads us to conclude that the trial court reached the right conclusion, except for the two minor exceptions subsequently noted.

II.

The petitioners⁷ consolidate the Fourth and Fifth Amendment issues throughout their brief. They phrase the issue in this fashion:

“Should the Petitioners, A through H, have the right and privilege to assert their Fourth and Fifth

⁷ Attorney Q does not raise these issues, and thus we do not address them as to him.

Appendix A

Amendment rights by not appearing, testifying or producing records before the Denver County Grand Jury?”⁸

Concededly, Fourth and Fifth Amendment rights are intertwined. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946); *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886). However, we elect, as far as possible, to treat them separately.

A. FOURTH AMENDMENT

Petitioners contend that the subpoenas *duces tecum* violate their rights against unreasonable searches and seizures as protected by the Fourth Amendment to the United States Constitution.⁹

The Fourth Amendment protects against unreasonable searches and seizures. This protection extends only to those interests in which one has a reasonable expectation of privacy. *United States v. Miller*, (U.S. Sup. Ct., No. 74-1179, announced April 21, 1976) 44 U.S.L.W.

⁸ Petitioner's reply brief answers the question in a similar manner:

“The thrust of respondent's answer brief with regard to the Fourth and Fifth Amendment rights of the Petitioners is essentially that because corporations are involved, there can be no claim of a privilege against self-incrimination. While there is, admittedly, a well-developed body of law dealing with the production of corporate records, there is little doubt that the leading cases in Colorado carve out exceptions under certain circumstances.”

⁹ Petitioners do not allege any violation of Article II, Sec. 7, of the Colorado Constitution, and we do not decide this case under the state constitutional provision.

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4528; see *Air Pollution Variance Board v. Western Alfalfa*, 416 U.S. 861, 94 S.Ct. 2114, 40 L.Ed. 2d 607 (1974); *Hoffa v. United States*, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed. 2d 374 (1966).

It is clear that the individual petitioners A, B, D, E and G do not have standing to contest the subpoena of the documents in the possession of the corporate defendants because they simply do not have the requisite expectation of privacy in the corporate documents that is required under the Fourth Amendment. However, corporate petitioners C, F and H have an expectation of privacy regarding their corporate records. Unlike the Fifth Amendment, the protection of the Fourth Amendment is available to corporations, *Oklahoma Press Pub. Co. v. Walling*, *supra*; *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920); *Hale v. Henkel*, 201 U.S. 43, 26 S. Ct. 370, 50 L.Ed. 652 (1906); and therefore, only the corporate petitioners have standing to raise the Fourth Amendment issue.

The petitioners state categorically that it is improper for the district attorney to use grand jury subpoenas *duces tecum* and that such use effectively abrogates their Fourth Amendment rights.

The production of documents in response to a subpoena *duces tecum* in a number of cases has been likened to and distinguished from searches and seizures under the Fourth Amendment. *Oklahoma Press Pub. Co. v. Walling*, *supra*; *Wilson v. United States*, 221 U.S. 361, 31 S.Ct. 538, 55 L.Ed. 771 (1911); *Hale v. Henkel*, *supra*; *Interstate Commerce Comm'n v. Brimson*, 154 U.S. 447, 14 S. Ct. 1125, 38 L.Ed. 1047 (1894); *Boyd v. United States*, *supra*.

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The petitioners in their petition and in their brief have forcibly argued the Fifth Amendment right against self-incrimination, the attorney-client privilege and the work-product exemption, but have only tangentially mentioned the Fourth Amendment in passing.

Since the Fourth Amendment issue has been interjected into these proceedings, we will touch on the issue briefly. It is apparent from our research that, under the circumstances of this case, the Fourth Amendment is not the real issue. In any event, there is no factual basis for a valid Fourth Amendment claim.

The short answer to the Fourth Amendment issue is that there has been no *actual* search and seizure. There has been no invasion of the home, the office, the person, nor any seizure of the private papers of the petitioners against their will. In addition, our rules place the court between the order of the subpoena and an enforceable court order to produce. Crim. P. 17(c) provides that:

"The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. . . ."

The petitioners here made such a motion to quash, and the court *in camera* examined the documents specified in the subpoenas before entering its order to produce the documents. Thus, the impartial intervention of the judge stood between the demand of the subpoena to produce and the court's order to produce.

There was and is no claim that the documents sought are not relevant to the grand jury's inquiry or that compliance with the order is "unreasonable or oppressive".

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In fact, it seems to be the position of the petitioners that the protection of the Fourth Amendment is absolute, rather than a protection against *unreasonable* action by the People. The authorities overwhelmingly support the contrary view.

The United States Supreme Court in *Oklahoma Press Pub. Co. v. Wallin*, *supra*, stated the applicable principle of law:

"... [T]he Fourth [Amendment], if applicable [to subpoenas for the production of corporate records], at the most safeguards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant. The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable."

This rule has been consistently applied by the courts. *United States v. Morton Salt Co.*, 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 401 (1950); *Wilson v. United States*, 221 U.S. 361, 31 S.Ct. 538, 55 L.Ed. 711 (1911); *Hale v. Henkel*, *supra*; *Interstate Commerce Comm'n v. Brimson*, 154 U.S. 447, 14 S.Ct. 1125, 38 L.Ed. 1047 (1894); *Boyd v. United States*, *supra*; *In re Grand Jury Proceedings*, 486 F.2d 85 (3rd Cir. 1973); *United States v. Malnik*, 489 F.2d 682 (5th Cir. 1974); *Schwimmer v. United States*, 232 F.2d 855 (8th Cir. 1956); *United States v. Reno*, 522 F.2d 572 (10th Cir. 1975); *In re Corrado Bros., Inc.*, 367 F. Supp. 1126 (D. Del. 1973); *Dixon v. Pennsylvania*, 347 F. Supp. 138 (M.D. Pa. 1972);

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In re Blue Hen Country Network, Inc., 314 A.2d 197 (Del. Super. 1973); *State ex rel. Pollard v. Criminal Court of Marion County*, 329 N.E. 2d 573 (Ind. 1975); *Steele v. State ex rel. Gorton*, 85 Wash. 2d 585, 537 P. 2d 782 (1975).

B. FIFTH AMENDMENT

Privilege of Corporations

For convenience in dealing with the Fifth Amendment privilege against self-incrimination, we will first consider the claims of the corporate petitioners C, F and H. The general rule is that the privilege against self-incrimination is a personal one and may not be invoked by corporations. *Bellis v. United States*, 417 U.S. 85, 94 S.Ct. 2179, 40 L.Ed. 2d 678 (1974); *Campbell Painting Corp. v. Reid*, 392 U.S. 286, 88 S.Ct. 1978, 20 L.Ed. 2d 1094 (1968); *P.U.C. v. District Court*, 180 Colo. 390, 505 P. 2d 1300 (1973).

Privilege of Representatives of Corporations

We now turn our attention to the personal claims of the privilege by the individual petitioners A, B, D, E and G with regard to the command in the subpoenas to produce specified documents (*subpoena duces tecum*).

While it is clear the privilege against compulsory self-incrimination protects a person from compelled production of his private papers and effects, the same person cannot invoke the privilege "to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally." *Bellis v. United States*, *supra*;

see Annot., "Self-Incrimination—Corporate Records," 52 A.L.R. 3d 636.

All of the exhibits ordered by the respondent to be produced by the individual petitioners are corporate documents and records which were in their custody as representatives of the corporate petitioners. Thus, the respondents' order which directed the individual petitioners to produce "the corporate records under their care, custody and control" was a proper application of the law and did not violate the individual petitioners' Fifth Amendment rights.

Privilege of Individuals

Petitioners also argue that as suspects the privilege against self-incrimination militates against their having to respond to the command of the subpoena to *appear* before the grand jury. The law is so well settled adversely to the position of the petitioners that the citation of authority is not necessary.

Furthermore, their contention that they cannot be compelled to testify is, under the state of the record, premature. None of the petitioners has been requested nor ordered to take the oath by the foreman of the grand jury. Crim. P. 6(c). The proper time to raise the Fifth Amendment privilege is when a question is propounded by the district attorney or by a juror which the witness believes might tend to incriminate him or furnish a link in a chain of evidence that might incriminate him.

A witness before a grand jury cannot assert his Fifth Amendment right against self-incrimination by a *blanket refusal* to answer all questions put to him. *Smaldone v.*

People, 158 Colo. 7, 405 P.2d 208 (1965), *cert. denied*, 382 U.S. 1012, 86 S.Ct. 616, 15 L.Ed. 2d 527 (1966); *Smaldone v. People*, 158 Colo. 16, 404 P.2d 276 (1965); *Smaldone v. People*, 158 Colo. 21, 404 P.2d 279 (1965). When asked a specific question or series of questions, the answers to which he believes will tend to incriminate him, he may refuse to answer. If the grand jury or the district attorney persists, then the matter must be presented to the district court for a ruling pursuant to the procedure outlined in the series of *Smaldone* cases, *supra*. Also, see C.R.C.P. 107.

III. ATTORNEY-CLIENT PRIVILEGE

The common law attorney-client privilege has been codified in Colorado in section 13-90-107, C.R.S. 1973. It reads:

"Who may not testify without consent. (1) There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person shall not be examined as a witness in the following cases:

. . . .

"(b) An attorney shall not be examined without the consent of his client as to any communication made by the client to him or his advice given thereon in the course of professional employment; nor shall an attorney's secretary, stenographer, or clerk be examined without the consent of his employer concerning any fact, the knowledge of which he has acquired in such capacity."

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The attorney-client privilege exists for the personal benefit and protection of the client. *Losavio v. District Court*, Colo. , 533 P.2d 32 (1975); *Fearnley v. Fearnley*, 44 Colo. 417, 98 P. 819 (1908); *In re Shapter's Estate*, 35 Colo. 578, 85 P. 688 (1906); *Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 P. 848 (1894); *Sholine v. Harris*, 22 Colo. App. 63, 123 P. 330 (1911). It may be expressly or implicitly waived, but only by the client. *Losavio v. District Court*, *supra*; *People v. Mullins*, Colo. , 532 P.2d 736 (1975); *Hill v. Hill*, 106 Colo. 492, 107 P.2d 597 (1940); *Fearnley v. Fearnley*, *supra*. The privilege exists "without regard to the non-corporate or corporate character of the client," *Radiant Burners, Inc. v. America Gas Ass'n*, 320 F.2d 314 (7th Cir.), *cert. denied*, 375 U.S. 929, 84 S.Ct. 330, 11 L.Ed. 2d 262 (1963), and, therefore, the attorney-client privilege is available to corporations. *D. Simon, The Attorney-Client Privilege as Applied to Corporations*, 65 Yale L.J. 953 (1956).¹⁰

For the purpose of discussing the applicability of the attorney-client privilege to the documents in the twenty-five exhibits, we will separate the documents into categories A through E, and then analyze each general category.

¹⁰ The issue of who speaks on behalf of the corporate client in the attorney-client relationship is not raised as an issue in this case. *See Annot.*, 9 A.L.R. Fed. 685. Therefore, we will assume for this case that each of the communications involved was made to or by the corporate client. However, we do not decide the issue in this opinion.

Appendix A

A. INVOICES AND BILLINGS

Category A contains invoices and billings for services rendered by Factual Service Bureau to the insurance company petitioners. Petitioners and intervenor do not specifically advance any arguments regarding the privileged nature of this category of documents. Therefore, the order to produce this category of documents is assumed to be proper.

B. COMPLETED ORDER FORMS

Category B contains completed forms by which the insurance company petitioners ordered services from Factual Service Bureau. Petitioners contend that these documents are privileged under the rationale of *Bellmann v. District Court*, 187 Colo. 350, 531 P.2d 632 (1975).

In *Bellmann* we held that the statement given by an insured to an employee of his insurance company was protected under the attorney-client privilege because of the contractual obligations between the insured and insurer.

"The Dairyland contract requires the company to defend the petitioner in civil suits such as were filed against him shortly after the accident. Pursuant to this provision, Dairyland retained a local law firm to represent petitioner in these civil matters. Since control of petitioner's defense rested entirely with Dairyland and counsel retained by them, we hold that the insurance investigator who took the petitioner's statement was, in effect, an agent of the attorneys for the purpose of acquiring and transmitting this information to them. As such, the communi-

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cation falls within the attorney-client relationship and is therefore privileged." *Id.*

The effect of our holding was to cast the insured in the role of client, and the insurance company investigator as an agent of the attorney.

The *Bellmann* case is consistent with the cases holding that in order to come within the protection of the privilege, there must be a communication *between the client, i.e., insured, and his attorney or the attorney's agent, i.e., an insurance company.* The communication in the documents included in category B is not between an insured (client) and his insurance company (attorney's agent). Therefore, the documents are not privileged under *Bellmann*.

C. INVESTIGATIVE REPORTS

Category C contains investigative reports prepared by Factual Service Bureau at the request of and for the insurance company petitioners.

Petitioners claim that these documents are privileged under *Bellmann*. For the same reason we rejected the *Bellmann* argument in category B, we reject it here.

D. INTEROFFICE MEMORANDA

Category D contains memoranda between insurance adjusters and their employer insurance companies regarding certain insurance claims. Petitioners again assert the *Bellmann* argument, and again we reject it for the reasons stated in category B.

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E. CORRESPONDENCE BETWEEN PETITIONERS AND COUNSEL

Category E consists of correspondence between petitioners and their counsel regarding claims and litigation, potential as well as pending. The documents appear to fall within the protection of the privilege. However, the district attorney contends that the documents are not privileged because they fall within the criminal purpose exception to the attorney-client privilege.¹¹ We agree with the district attorney in large part, and hold that only the letter dated May 1, 1972, in Exhibit B-3 and the letter dated October 15, 1974, in Exhibit B-4 are protected by the attorney-client privilege.

Simply stated, the exception provides that communications between a client and his attorney will not be privileged if they are made for the purpose of aiding the commission of a future crime or of a present continuing crime. *Losavio v. District Court, supra; see Annot., "Attorney-client privilege as affected by wrongful or criminal character of contemplated acts or course of conduct."* 125 A.L.R. 508; *J. Gardner, The Crime or Fraud Exception to the Attorney-Client Privilege*, 47 A.B.A.J. 708 (1961).

The attorney-client privilege is rooted in the principle that candid and open discussion by the client to the attorney without fear of disclosure will promote the order-

¹¹ The cases seem to disagree on the breadth of the exception regarding non-criminal wrongdoings in the attorney-client relationship. As this case only involves certain alleged *criminal* conduct in the relationship, we need not address the issue of the scope of the exception in this opinion, and, of course, we do not decide it.

ly administration of justice. *Losavio v. District Court, supra*. The criminal purpose exception to the privilege grows out of a competing value of our society which is manifested in the rule that "the public has the right to every man's evidence, particularly in grand jury proceedings."¹² Consequently, the attorney-client privilege is not absolute.

Wigmore addressed the policy underlying the exception in his treatise:

"It has been agreed from the beginning that the privilege cannot avail to protect the client in concerting with the attorney a *crime* or other evil enterprise. This is for the logically sufficient reason that no such enterprise falls within the just scope of the relation between legal adviser and client." 8 *J. Wigmore, Evidence* §2298.

Professor McCormick also offered observations on the exception in his treatise:

"Since the policy of the privilege is that of promoting the administration of justice, it would be a perversion of the privilege to extend it to the client who seeks advice to aid him in carrying out an illegal . . . scheme. Advice given for those purposes would not be a professional service but participation in a conspiracy." *McCormick, Evidence* §95.

Canon 4 of the Code of Professional Responsibility recognizes the exception with which we are here concerned. DR 4-101 states:

¹² *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed. 2d 626 (1972); *Losavio v. District Court, supra*.

"(c) A lawyer may reveal:

. . . .

"(2) Confidences or secrets when permitted under Disciplinary Rules or *required by law or court order*; (Emphasis added).

"(3) The intention of his client to commit a crime and the information necessary to prevent the crime."¹³

The petitioners and intervenor do not contend that there is no such exception to the attorney-client privilege. Rather, they question the procedure followed by the court to determine whether the privilege should be dissolved under this exception. They claim that the respondent erred when he ordered the documents produced for his *in camera* inspection without first requiring the district attorney to make a *prima facie* showing that the exception applied.

We recognize that before the privilege can be "driven away" there must be "something to give colour to the charge".¹⁴ The "prima facie evidence" mentioned in *Clark*

¹³ Of course, the attorney shall not "engage in illegal conduct involving moral turpitude," DR 1-102(A)(3), or "counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent," DR 7-102(a)(7), or "knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule." DR 7-102(A)(8). He may "refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal." DR 7-101(b)(2). Depending on the circumstances, he may be required to withdraw from the case, DR 2-110(B), or permitted to withdraw. DR 2-110(c).

¹⁴ *Clark v. United States*, 289 U.S. 1, 53 S.Ct. 465, 77 L.Ed. 993 (1932).

v. United States, 289 U.S. 1, 53 S.Ct. 465, 77 L.Ed. 993 (1932), is not tantamount to proof of a *prima facie* case. It means in the present situation that there must have been some foundation in fact for the charge of conspiracy to steal confidential medical records—the very matter which the grand jury was investigating—before the documents were admitted in evidence in the grand jury proceeding.

In considering the privilege which protects the arguments and ballots of a juror, Mr. Justice Cardozo, in *Clark*, analogized that privilege to the privilege which protects communications between an attorney and client. Several of his statements are pertinent to the point under consideration here. He said, *inter alia*:

“... we think the privilege does not apply where the relation giving birth to it has been fraudulently begun or fraudulently continued. . . . The privilege takes as its postulate a genuine relation, honestly created and honestly maintained. If that condition is not satisfied, if the relation is merely a sham and a pretense, the juror may not invoke a relation dishonestly assumed as a cover and a cloak for the concealment of the truth. In saying this we do not mean that a mere charge of wrongdoing will avail without more to put the privilege to flight. There must be a showing of a *prima facie* case sufficient to satisfy the judge that the light should be let in.”

A *prima facie* showing is not required *before* the judge can order a document produced for his *in camera* inspection to determine whether the privilege applies. The judge may order a document or documents produced when the privilege is first contested by the other party. However, there must be a *prima facie* showing that the excep-

tion applies to each document before the document is actually stripped of its privilege and admitted into evidence. Of course, the burden is upon the party asserting the exception.

Although such a procedure requires that “the secret must be told in order to determine whether it ought to be kept,” *Hamil & Co. v. England*, 50 Mo. App. 338 (1892), it is a reasonable method to reconcile the competing policies of the attorney-client privilege and the search for truth by the grand jury.

In his argument to the respondent court on petitioners’ motion to quash the subpoenas, counsel for petitioners asked the court to take judicial notice of the fact that on the evening before the argument the grand jury had returned an indictment to the court “in which four individuals involved in this particular investigation were indicted on a number of counts.” (Emphasis added.) The indictments related to alleged offenses and gave “colour to the charge” that a conspiracy existed to obtain hospital and medical records in an illegal manner.

The documents in categories A, B, C and D are not protected from production under the subpoena *duces tecum* under any theory, as was shown above and will be shown below. There was evidence in these documents that gave “colour” to the charge of possible illegal conduct.

Standing alone, the correspondence in category E is not sufficient to make out a *prima facie* case for the application of the exception.¹⁵ However, the indictments,

¹⁵ This does not rule out the possibility in another case that a challenged document on its face will provide the *prima facie* case for the application of the exception.

combined with the information in the other documents ordered produced, are sufficient evidence to make out a *prima facie* case of the applicability of the criminal purpose exception to each of the documents in which Factual Service Bureau was alluded to. This includes all correspondence between petitioners and their counsel in category E except for two letters: (1) the letter dated May 1, 1972, in Exhibit B-3, and (2) the letter dated October 15, 1974, in Exhibit B-4. These two documents do not mention Factual Service Bureau and, therefore, are protected by the attorney-client privilege.

IV. WORK PRODUCT

Petitioners contend that the exhibits in categories B, C, D and E are protected by the work-product exemption from compelled disclosure under a grand jury subpoena.¹⁶ This contention raises a unique issue: whether the work-product exemption applies to documents originally prepared in anticipation of civil litigation which are later subpoenaed by a grand jury investigating possible criminal activity involved in the gathering of some of the information contained in such documents. For the purpose of resolving this issue, we will assume, without deciding, that the materials in the exhibits would qualify as work-product in the civil litigation under C.R.C.P. 26(b).

The attorney-client privilege and the work-product exemption are distinct but related theories, arising out of

¹⁶ As in their attorney-client privilege claim, petitioners do not claim the work-product exemption for the documents in category A. We will assume that they are not protected by the exemption, without deciding the issue.

similar policy interests. *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 384, 91 L.Ed. 451 (1947); 8 J. Wigmore, *Evidence* §2318 (McNaughton rev.). Generally, the attorney-client privilege protects communications between the attorney and the client, and the promotion of such confidences is said to exist for the benefit of the client. *Losavio v. District Court*, *supra*; *Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 P. 848 (1894). On the other hand, the work-product exemption generally applies to "documents and tangible things . . . prepared in anticipation of litigation or for trial," C.R.C.P. 26(b)(3), and its goal is to insure the privacy of the attorney from opposing parties and counsel.

"Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the

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Circuit Court of Appeals in this case as the 'work product of the lawyer.' Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." *Hickman v. Taylor, supra*.

The work-product exemption is applicable even when the client is a corporation. *In re Grand Jury Proceedings*, 473 F.2d 840 (8th Cir. 1973); *Radiant Burners, Inc. v. American Gas Association, supra*.

Although it is generally conceded that the work-product exemption applies to discovery in criminal trials, *People v. District Court*, 187 Colo. 333, 531 P.2d 626 (1975); *Crim. P.* 16; see *United States v. Nobles*, 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed. 2d 141 (1975), there is some disagreement as to whether the exemption should apply to grand jury proceedings.

Two recent cases specifically address the issue. *In re Grand Jury Proceedings, supra*, the Eighth Circuit Court of Appeals held that an attorney was exempt from disclosing under a grand jury subpoena his work-product which was gathered in anticipation of defending his corporate client against criminal charges of alleged bribery of public officials. The grand jury was investigating the client in relation to similar charges.

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In *United States v. Terkel*, 256 F. Supp. 683 (S.D.N.Y. 1966), the client was indicted for perjury. The court held that the attorney was exempt under the work-product doctrine from disclosing to a grand jury the details of an alleged meeting he and his client had with a third party where the lawyer supposedly attempted to "persuade" the third party to support his client's story when the third party took the stand to testify about the criminal case.

We agree with the holdings of both these decisions that the exemption should apply in situations before a grand jury where the work-product was gathered for the purpose of preparing to defend the client against an anticipated or pending criminal charge, which charge was also the subject of the grand jury investigation. However, there is an important distinction between these two cases and the present case. In the two cases cited, the attorneys were gathering information in anticipation of criminal charges or in preparation for a criminal trial. In each case, the grand jury sought the work-product to aid its investigation of the same criminal charges against the client for which the work-product was gathered. In the present case, the work-product was gathered in anticipation of civil litigation regarding civil insurance claims, the subject matter of which was wholly unrelated to the grand jury's interest. The work-product in this case, unlike in the two cited cases, was not prepared for the defense of specific criminal charges. The grand jury subpoenaed the materials, not for its interest in the *substance* of the exhibits for its own sake, but rather as possible evidence of any criminal *means* used in acquiring the information contained in the exhibits.

We hold that work-product prepared by counsel in anticipation of specific civil litigation which is sought by a grand jury is not protected by the work-product exemption unless the subject matter of the civil case and the grand jury proceeding are closely related. See *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551 (2nd Cir. 1967); *Midland Inv. Co. v. Van Alstyne, Noel & Co.*, 59 F.R.D. 134 (S.D.N.Y. 1973); *Stix Products, Inc. v. United Merchants & Mfrs., Inc.*, 47 F.R.D. 334 (S.D.N.Y. 1969); *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 275 F. Supp. 146 (E.D.Pa. 1967); *Insurance Co. of N. America v. Union Carbide Corp.*, 35 F.R.D. 520 (D.Colo. 1964); *Shields v. Sobelman*, 64 F. Supp. 619 (E.D.Pa. 1946); *Annot.*, 35 A.L.R. 3d 412, §19.

The policy underlying the relation of the subject matter test was stated by Judge Doyle in *Ins. Co. of N. America v. Union Carbide Corp.*, *supra*:

"The rationale which compels that we be extremely reluctant to invade an attorney's files is scarcely less applicable to a case which has been closed than to a case which is still being contested. Adversary counsel in an active case, obviously should not normally be free to force his opponent to reveal his strategy; but neither should counsel in a closely related subsequent case, albeit between different parties in part, obtain *carte blanche* to examine an attorney's files in the former case."

In the present case, the work-product was prepared for civil litigation based upon the defense of insurance claims. On the other hand, the grand jury seeks the information for its criminal investigation of the means used to gather the work-product in the civil case.

There are several important distinctions between the insurance litigation and the grand jury investigation. The nature of the proceedings are obviously different. The one, civil in nature, is basically the defense of insurance claims based on personal injuries, while the other is alleged criminal theft of documents occurring during the preparation stage of defending the insurance claims. The alignment of parties is not similar. In one a claimant is suing an insurance company for civil damages, and in the other a grand jury is proceeding to investigate the possible criminal conduct of the insurance company and its employees.

In the present case, these divergent factors lead us to conclude that the civil litigation in which the work-product was gathered is not so closely related to the grand jury investigation as to require the application of the work-product exemption. We hold that none of the documents before us are protected as work-product.

Therefore, the rule is discharged as to all documents in the sealed exhibits in this proceeding except for the two noted in section III E of this opinion. As to those two documents, the rule is made absolute.

The rule is made absolute in part, and is discharged in part.

Mr. Justice Erickson does not participate.

Appendix B

APPENDIX B

IN THE SUPREME COURT, STATE OF COLORADO

No. 27044

A, B, C, D, E, F, G, and H,
 Petitioners,

vs.

The District Court of the Second Judicial District and
 the Honorable Leonard Plank, Judge thereof,
 Respondents,

vs.

Attorney Q,
 Intervenor.

PETITION FOR REHEARING FROM A DECISION
 ISSUED ON MAY 24, 1976, BY THE HONORABLE
 JUSTICE DONALD KELLEY

ORIGINAL PROCEEDING

EN BANC

RULE MADE ABSOLUTE IN PART AND
 DISCHARGED IN PART

Appendix B

[Caption Omitted.]

MOTION FOR RECONSIDERATION

COME NOW Petitioners, A, B, C, D, E, F, G, and H, by and through their attorney, Jon L. Holm, of the firm of Holm, Willis & Dill, Professional Corporation, and respectfully petition this Honorable Court for a rehearing on the above-captioned matter.

AND AS GROUNDS THEREFORE state to the Court as follows:

1. This Court recognizes the fact that the Fourth Amendment protections against unreasonable searches are available to corporations, (Petitioners C, F and H) (Opinion, Page 9). This Court also ruled (Opinion, Page 10), that there had been no "actual search and seizure," nor had there been any seizure "of the private papers of the Petitioners against their will."

2. In actuality, there is little difference between the execution of the search warrant or service of a Subpoena Duces Tecum as it relates to a suspect before the Grand Jury. With the execution of a search warrant, the subject is accorded *prior* approval of an impartial magistrate who determines whether there is probable cause to believe that a crime has been committed, and that fruits, instrumentalities, contraband, or evidence of that crime may be discovered at a specific location.

With the issuance of a Grand Jury Subpoena Duces Tecum, the subject is required to submit all property otherwise susceptible to execution of a search warrant, to the

Court and the Grand Jury without any prior determination as to probable cause. Without such a prior determination of probable cause, the seizure—the required production—is “unreasonable.” There is little doubt that such seizure is against the will of the Petitioners, as they are still protesting its required production and are under the threat of contempt of Court and going to jail for refusing to produce.

3. In speaking to the Fifth Amendment privilege which was asserted by Petitioners, this Court did not rule on the leading Colorado case in this field, *People v. Schneider*, 292 P.2d 982 (Colo.-1956). To reiterate the basic holding of *Schneider*:

“It is intolerable that one whose conduct is being investigated for the purpose of fixing on him a criminal charge, should, in view of our constitutional mandate, be summoned to testify against himself and furnish evidence upon which he may be indicted. It is plain violation both of the letter and spirit of our organic law.”

It seems illogical that this Court would provide such constitutional protections to a suspect, that would not require him to bring in public county records, and not provide the same protection to a suspect with regard to corporate papers. Because corporations can be charged criminally under Colorado law, 1973 C.R.S. 18-1-606 and 607, corporate Defendants should have the same protections provided to individuals who are being charged with criminal offenses.

4. With regard to the attorney-client privilege asserted by Petitioners, this Court indicated that the privi-

leges belonged to both the individual and the corporation. (Opinion, Page 15). This Court held that Category A, Invoices and Billings; Category B, Completed Order Forms; Category C, Investigative Reports; and Category D, Interoffice Memoranda, could not be protected by the attorney-client privilege because such documents were not the result of a direct communication between the attorney and client. The Court does, however, assume that the documents in these categories are work product. The substance of the Court's ruling is that work product for civil litigation is not protected from discovery or subpoena in a criminal proceeding. The cases cited by the Court to support this ruling, however, appear to state the opposite. For example, *Republic Gear Company v. Borg-Warner Corp.*, 381 F.2d 551 (2nd Cir. 1967) at page 558, “. . . the work product documents are protected from discovery irrespective of which law is deemed determinative,” and *Midland Inv. Co. v. Van Alstyne, Noel & Co.*, 59 F.R.D. 134 (S.D.N.Y. 1973) wherein the District Court for the Southern District of New York found that because governmental actions against a Defendant were often accompanied by private actions against the same Defendant, the work product privilege should *not* be destroyed. These cases also condemn the practice of forum or jurisdiction shopping to destroy the work product privilege.

All of the above appear to contradict the Court's ultimate decision that the work product privilege cannot be asserted in this particular Grand Jury proceeding.

5. The final point which Petitioners would respectfully assert to this Court is that the burden required of the District Attorney to carve out an exception to the attorney-

Appendix B

client privilege based upon the existence of a communication "made for the purpose of aiding the commission of a future crime of a present, continuing crime," does not meet constitutional standards. The effect of this section of the Opinion is to deny to the Petitioners the protections of due process. There has been no requirement that there be any evidence submitted independent of the documents themselves to establish a *prima facie* case for the exception. In addition, the Petitioners are given absolutely no right to rebut in any manner the bald allegations which would support such a "*prima facie* case."

The purpose of Petitioners' counsel citing the fact that others had been indicted in "this particular investigation" was to establish the fact that the Petitioners themselves were suspects, and had been told by the District Attorney that they were susceptible to indictment. There is nothing in the record before the trial court, or in this Court, which provides independent evidence of the fact that the criminal purpose exception should apply. The sole facts to be garnered from the indictment are that some medical records were involved and that a private detective firm, Factual Services, was charged. This Court's ruling would imply that anyone who had any association with that detective firm must be under suspicion. Such association does not supply the *evidence* required to make a *prima facie* case, and without that, as the Court has stated, "Standing alone, the correspondence in Category E is not sufficient to make out a *prima facie* case for the application of the exception." (Opinion, Page 23).

Appendix B

NOW THEREFORE:

Petitioners respectfully request that this Honorable Court grant a rehearing to Petitioners. Further, that the ruling originally issued by this Court be made absolute in all respects.

Respectfully submitted this 7th day of June, 1976.

Attorney for Petitioners

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Appendix C

APPENDIX C

Monday, June Fourteenth, A.D. 1976

IN THE SUPREME COURT OF THE STATE OF
COLORADO

A, B, C, D, E, F, G, and H,

Petitioners,

27044

v.

The District Court of the Second Judicial District and
The Honorable Leonard Plank, Judge thereof,

Respondents,

Attorney Q,

Intervenor.

ORIGINAL PROCEEDING

On consideration of the petitions for rehearing filed in the above cause, it is this day ordered that the opinion of the court be modified, and as modified the petitions be, and the same hereby are, denied.

By the Court,
En Banc.

June 14, 1976.

Appendix C

CLERK'S OFFICE
SUPREME COURT
STATE OF COLORADO
Denver 80203

June 14, 1976

Case No. 27044

A, B, C, D, E, F, G, and H.

v.

District Court, et al.

Please substitute the enclosed page 3 for the like numbered page of the opinion of the court filed in the above numbered and titled case on May 24, 1976. The opinion was modified and as modified the petitions for rehearing were denied.

Yours very truly,
Richard D. Turelli, Clerk.
By Elaine Walsh,
Deputy Clerk.

The statutory grand jury had been empaneled for some time and was investigating criminal acts alleged to have been committed by Factual Service Bureau, Inc., a private investigation firm, and its activities and relationship to certain insurance companies and attorneys. More specifically, the grand jury was investigating the possible existence of conspiracies to obtain confidential medical in-

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formation by criminal means for use by the insurance companies and their attorneys in assessing and defending personal injury claims.

Petitioners C, F and H are insurance companies. Petitioners A and B are employees of petitioner C. Petitioners D and E are employees of petitioner F, and petitioner G is an employee of petitioner H. Attorney Q is a member of a Denver law firm which has represented insurance companies C and F for a period in excess of twenty years.²

In November, 1975, when petitioners and Attorney Q were either residents of or doing business in Colorado, they were served with grand jury subpoenas.³ The subpoenas

² The lawyer for insurance company petitioner G has not been subpoenaed and is not a party in this proceeding.

³ Employee petitioners A and B, D and E, and G were served individually and in their capacities as agents or managers of insurance company petitioners C, F and H respectively. Thus, the insurance company petitioners were served through petitioners A, B, D, E, and G.